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Skadden Discusses Pros and Cons of "Home Country" Arbitration Clauses

By Julie Bédard, Lea Haber Kuck and Timothy G. Nelson February 26, 2018

Comment

Courts in many countries, including the U.S., generally enforce contracts with clauses specifying international arbitration as the preferred avenue for resolving disputes. Accordingly, when drafting such provisions, due consideration must be placed on ensuring that such clauses are drafted to fully reflect the parties' desires.

In addition to clarifying what kinds of disputes are to be arbitrated and which institutional rules (if any) will govern the proceedings, any agreement between two parties also should identify where the arbitration proceedings are to take place. Many clauses simply state that all disputes will be arbitrated in a single location (commonly New York, London or Hong Kong). Some, however, adopt more elaborate procedures. One mechanism, known as the "home country" provision, provides that the party initiating arbitration must sue the other party in its home country. Proponents of such clauses say they provide a disincentive to elevate disputes because a party will be reluctant to go to the other side's home country. Though they are not widely used in large transactions (and are not recommended in arbitral literature or by arbitral institutions), they are occasionally present.

Complications can arise from such clauses, as evidenced by a 2017 case in the U.S. Court of Appeals for the Eleventh Circuit that was recently denied *cert* by the U.S. Supreme Court. The clause at issue in *Bamberger Rosenheim, Ltd. v. OA Development, Inc.* was included in a solicitation agreement between Profimex, an Israeli company engaging in fundraising for real estate developments, and OAD, a U.S. real estate developer based in Atlanta. The clause stated:

Any disputes with respect to this Agreement or the performance of the parties hereunder shall be submitted to binding arbitration proceedings conducted in accordance with the rules of the International Chamber of Commerce. Any such proceedings shall take place in Tel Aviv, Israel, in the event the dispute is submitted by OAD, and in Atlanta, Georgia, in the event the dispute is submitted by Profimex.

When disputes arose between the parties, Profimex instituted an International Chamber of Commerce (ICC) arbitration against OAD in Atlanta alleging breach of contract. OAD responded with a counterclaim for defamation.

The ICC appointed a single arbitrator in Atlanta. Profimex then moved to dismiss OAD's counterclaim, arguing that the arbitration clause required that the dispute be brought in Israel. The arbitrator, however, determined that "venue for the defamation counterclaim was proper in Atlanta, in part, because the 'dispute' was submitted by Profimex." He ultimately dismissed most of Profimex's claim but upheld the counterclaim and awarded substantial libel damages in OAD's favor. The "end result" was that "Profimex was left on the hook for approximately $454,000 to OAD for the defamation claims." (*See* Caroline Simson, "High Court Won't Review Real Estate Arbitral Venue Dispute," *Law360*, Jan. 10, 2018).

Profimex sought to vacate the award in the U.S. District Court for the Northern District of Georgia on the ground that the arbitrator had exceeded his authority. By a decision issued in August 2016, virtually the whole of the award (save for a relatively small component of damages that both parties agreed had arisen from a mathematical error) was upheld, with the result that Profimex remained liable to pay net damages in the sum of $396,000. An appeal then ensued to the Eleventh Circuit.

In an opinion rendered in July 2017 upholding the award as modified, the Eleventh Circuit regarded the question of "venue" as being a "procedural" question that was presumptively a matter for the arbitrators, not the courts, to determine. Accordingly, it deferred to the arbitrator's determination about the admissibility of the counterclaim and upheld the award rendered in Atlanta.

On appeal, Profimex relied heavily on a 2010 decision by the U.S. Court of Appeals for the Ninth Circuit, *Polimaster Ltd. v. RAE Systems, Inc.*, in which the contract provided that arbitration was to be conducted "at the defendant's site" — that is, the location of the defendant's principal place of business. When Polimaster, which was based in Belarus, brought arbitration claims against California-based RAE in that state, RAE filed counterclaims. The Ninth Circuit ultimately held that the arbitrator should not have allowed RAE's counterclaims to proceed because the arbitration agreement required that all requests for affirmative relief, whether claims or counterclaims, be arbitrated at the defendant's site (which would have been Belarus in the case of RAE's counterclaims against Polimaster).

The Eleventh Circuit noted that *Polimaster* was "somewhat similar to the provision in the present case," but in *Bamberger*, it rejected Profimex's attempts to rely on the case. In its view, *Polimaster* was either distinguishable (on the basis of the particular wording of the clause in that case) or wrongly decided — especially since the Ninth Circuit failed to analyze whether the question of venue in *Polimaster* should have been decided by the arbitrator.

Profimex thereafter filed a petition with the U.S. Supreme Court seeking *certiorari*, claiming that there was a circuit "split" between the *Bamberger* and *Polimaster* decisions. On January 8, 2018, however, the Court denied that petition, meaning that the Eleventh Circuit's decision is now final. *Bamberger* and *Polimaster*, demonstrate that "home country" arbitration clauses may prove cumbersome to administer in practice and may result in unintended consequences for the parties.

Indeed, although the circuit courts' varying approaches in the two cases might be explained by the differently worded clauses, the outcomes nevertheless show that the courts' interpretation of "home country" clauses can be difficult to predict. Accordingly, parties may continue to opt for the relative simplicity of specifying that all disputes be adjudicated in a single neutral venue.

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm's blog post, "SEC Freezes Allegedly Fraudulent 'Decentralized Bank' ICO," dated January 23, 2018, and available here.

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